officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

STATEMENT OF THE CASE

On or about June 25, 2003, Johnston was indicted on eighteen counts of alleged mail and wire fraud, in violation of 18 U.S.C. § 1341 and 1343, as part of a superseding indictment issued by the grand jury of the United States District Court for the District of Maryland. The superseding indictment outlined an alleged "property flipping" scheme in inner city Baltimore, Maryland organized and led by Johnston's co-defendant at trial, Walter P. Hammond ("Hammond"). As alleged in the superseding indictment, properties were purchased and subsequently mortgaged for amounts far in excess of their true value, based upon fraudulent real estate appraisals.

Johnston was described in the superseding indictment as part of the alleged scheme to defraud. Johnston was the owner of two of a number of title companies which the Government alleged were involved in the scheme to defraud. Johnston had no knowledge or involvement in the acquisition of fraudulent appraisals and merely performed

ministerial functions in conducting settlements for the various real estate transactions identified in the superseding indictment. Moreover, Johnston denied any intent to defraud and asserted at trial, and maintains, that her conduct was undertaken in reliance upon the advice of her counsel Frederic Leffler, Esq. ("Leffler"), a co-defendant in the underlying trial, who advised her that the transactions described in the superseding indictment were legal and proper.

A six week trial was held in the United States District Court for the District of Maryland, the Honorable Andre M. Davis presiding. During the course of the trial, Hammond pled guilty and testified against Leffler, Johnston and co-defendant David Allen Uhrich ("Uhrich"). On May 28, 2004, the jury returned a verdict in which Johnston was convicted of five counts and acquitted on 13 counts while Leffler was convicted on all seventeen counts upon which he was charged.

Johnston was sentenced in the above captioned case on May 2, 2004 to a period of imprisonment of 27 months. (Pet. App. 6). As part of Johnston's sentence she was ordered to surrender to the Bureau of Prisons before 2 p.m. on June 17, 2005. (Pet. App. 6) The District Court extended Johnston's surrender date to July 29, 2005 in order to allow for appellate review of Johnston's Motion for Release Pending Appeal. (Pet. App. 3).

Johnston filed a Notice of Appeal before the United States Court of Appeals for the Fourth Circuit

on May 4, 2005. (Pet. App. 16)[1]. Johnston filed a Motion for Release Pending Appeal with the United States District Court for the District of Maryland on May 5, 2005. The Government filed its opposition to Johnston's Motion for Release Pending Appeal on May 23, 2005. Johnston filed a reply to the Government's opposition on June 3, 2003.

The United States District Court for the District of Maryland denied Johnston's Motion for Release Pending Appeal on June 21, 2005. (Pet. App. 2). No distinction or discussion was made of the issues presented by any individual defendant nor was any reasoning or statement of reasons given by the district court for its denials except for a statement that "the court is constrained to the view that a 'substantial question' has not been identified." (Pet. App. 2). The district court refused to hold a hearing, despite the requests of Johnston and her co-defendants at trial.

Johnston filed a Motion for Review of Denial of Bail Pending Appeal with the United States Court of Appeals for the Fourth Circuit on June 22, 2005. The Government submitted a response in opposition on July 1, 2005. Johnston filed a Reply brief on July 8, 2005.

The United States Court of Appeals for the Fourth Circuit entered a three sentence opinion on July 15, 2005 denying Johnston's Motion for Review of

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[1] As the record is still being prepared Johnston is unable in the instant motion to cite specifically thereto but has incorporated in the appendix the relevant written opinions and exhibits from the existing record.

Denial of Bail Pending Appeal. (Pet. App. 1). The appellate court held no oral argument and gave no reason for the denial. (Pet. App. 1).

Johnston now comes to this Court to seek a stay of her July 29, 2005 reporting date and permit Johnston's release pending the determination of her pending appeal before the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

This Court should enter an emergency stay of Johnston's July 29, 2005 reporting date in order to review the instant motion for release pending appeal.

Johnston was denied due process in the determination of her Motion for Release Pending Appeal as neither the United States District Court for the District of Maryland nor the United States Court of Appeals for the Fourth Circuit gave detailed written reasons for the denial of Johnston's request for release pending appeal. Johnston was also denied any opportunity to be heard and no reasons for the denial of Johnston's request were ever placed on the record.

Johnston is entitled to release pending appeal. There is clear and convincing evidence that Johnston does not pose a risk of flight or danger to the community, a point the Government has never contested. Johnston maintains her innocence and her appeal is not for purposes of delay.

Finally, there is a split among the circuits as to the definition of a "substantial question" under 18 U.S.C. § 3143(b) and alternate definitions have been adopted by the various United States Circuit Court of Appeals. Under any standard, however, Johnston has raised numerous substantial issues of law and/or fact which, determined in her favor, would result in reversal, an order of new trial, a sentence without a term of imprisonment or a reduced sentence with a term of imprisonment less than the expected duration of the appellate process.

JOHNSTON WAS DENIED DUE PROCESS IN THE DETERMINATION OF HER MOTION FOR RELEASE PENDING APPEAL.

The United States District Court for the District of Maryland, without any detail, determined that neither Johnston nor any of her co-defendants at trial presented a "substantial question" such that release pending appeal was warranted. (Pet. App. 2). The district court, while providing no statement of specific reasons and only generally listed the issues presented Johnston and her co-defendants at trial in total, denied all requests for a hearing and made no findings on the record to substantiate its denial of Johnston's Motion for Release Pending Appeal. The United States Court of Appeals for the Fourth Circuit was unable, therefore, to review any statement of reasons why the district court ruled as it did. Fed. R. App. P. 9(a) ("A party appealing from the order [denying release] must file with the court of appeals a copy of the district court's order and the court's statement of reasons"); Fed. R.

App. P. 9(b) (applying the provisions of Rule 9(a) to a motion for release after judgment of conviction).

Appellate Rule 9(b) requires the district court to state in writing the reasons for refusing release pending appeal. "A mere parroting of the provision of the statute is not enough." Wright & Miller, 3B Fed. Prac. & Proc. Crim.3d § 767, footnote 68 *citing, United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971) *cert. denied* 92 U.S. 998 (*abrogated on other grounds, Calloway v. District of Columbia,* 216 F.3d 1, 342 U.S. App. D.C. 110, 145 Ed. Law Rep. 555 (D.C. Cir. 2000)); *United States v. Manarite*, 430 F.2d 656 (2nd Cir. 1970) (If the district court refuses release pending appeal, district judge should state clearly and categorically his reasons for denying bail so that in reviewing his or her decision the Court of Appeal, and circuit justice, may be fully advised regarding basis for action of the district judge); *United States v. Smith*, 444 F.2d 61 (8th Cir.1971)(In refusing bail or imposing conditions of release, the district court must state in writing reasons for refusing bail or imposing conditions); *Weaver v. United States*, 405 F.2d 353 (D.C. Cir. 1968) (District judge in denying motion for release pending appeal should state in writing his reasons forth such denial, both out of fairness to the movant and as an aid to the reviewing court in its role in bail administration); *United States v. Fisher*, 55 F.3d 481, 487 (10th Cir. 1995)("Judicial action is not an exercise in *ipse dixit* - the bare assertion of an individual resting not on expressed reason, but merely on the authority vested in an office. Accordingly, when a judge takes action, it is fundamental that a basis grounded in the law is articulated.); *United States v. Swanquist*, 125 F.3d 573, 575 (7th Cir. 1997)(*per*

curiam)(district court's order denying release pending appeal was inadequate where it did "little more than track the statutory language before concluding that the criteria for release have not been met.").

The United States District Court for the District of Maryland failed to properly set forth its reasons supporting its conclusion that Johnston failed to present a substantial question. The district court has provided no guidance to United States Court of Appeals for the Fourth Circuit or this Court and "if no reason for that action is given, [the district court's decision] cannot be accorded the weight it would otherwise merit." Wright & Miller, 3B Fed. Prac. & Proc. Crim.3d §767, footnote 69 *citing Weaver v. United States*, 405 F.2d 353 (D.C. Cir. 1968). As such, Johnston has been denied her due process rights as outlined in Appellate Rule 9(b) and the cases cited interpreting it and guaranteed by the Fifth Amendment to the United States Constitution. At the very least, Johnston's reporting date should be stayed and her request for release pending appeal remanded to the United States District Court for the District of Maryland so that proper findings can be made.

JOHNSTON DOES NOT POSE A RISK OF FLIGHT OR DANGER TO THE COMMUNITY AND HER APPEAL IS NOT FOR THE PURPOSE OF DELAY.

The Government readily admitted to the United States District Court for the District of Maryland that Johnston is not a flight risk or a danger to the community. Johnston's strict obedience to the terms and conditions of her release for the five years that this

case has been investigated and pending and her character and background as presented at trial and in her Presentence Report are certainly "clear and convincing" evidence that Johnston "is not likely to flee or pose a danger to the safety of any other person or the community if released..." (Pet. App. 18); *See* 18 U.S.C. § 3143(b).

The Government also did not dispute that Johnston's appeal is not for purpose of delay. *See* 18 U.S.C. § 3143(b)(1)(B). Johnston maintains her innocence as she has done throughout the course of these proceedings despite the opportunities repeatedly offered to admit guilt in return for a reduced sentence. (Pet. App. 18). Johnston's sole purpose on appeal is to address the errors outlined herein, and others, and to exonerate herself of the few charges of which the jury did not acquit her.

THERE IS A SPLIT AMONG THE CIRCUITS AS TO THE DEFINITION OF A "SUBSTANTIAL QUESTION" UNDER 18 U.S.C § 3143(b)(1)(B).

The instant motion for release pending appeal is determined by the criteria set forth in 18 U.S.C. § 3143(b). Fed. R. App. Proc. 9(c). While multiple circuit courts have found that the statute should not be read literally to "require the district court to predict the probability of reversal" the actual definition of a "substantial question" varies. *United States v. Miller*, 753 F.2d 19, 23 (3rd Cir. 1985)("it would have been capricious of Congress to have conditioned bail on the willingness of the trial judge to certify his or her own error."); *See United States v. Randell*, 761 F.2d 122, 124

(2nd Cir. 1985)("However, like the other circuits that have considered this issue, we believe that such a construction does not fairly reflect congressional intent."); *United States v. Giancola*, 754 F.2d 898, 900-01 (11th Cir. 1985); *United States v. Handy*, 753 F.2d 1487, 1489 (9th Cir. 1985); *See generally*, Robin C. Larner, J.D., Annotation, *What is "A Substantial Question of Law or Fact Likely to Result in Reversal or An Order for New Trial" Pursuant to 18 U.S.C.A. § 3143(B)(2) Respecting Bail Pending Appeal*, 79 A.L.R. Fed. 673 (1986).

A number of decisions have defined "substantial question as "a close question or one that very well could be decided either way." *United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985); *See Morison v. United States*, 486 U.S. 1306 (1988)(Rehnquist, C.J. sitting as Circuit Judge); *United States v. Thompson*, 787 F.2d 1084, 1085 (7th Cir. 1986); *Giancola, supra*, 754 F.2d at 898; *United States v. Bayko*, 774 F.2d 516 (1st Cir. 1985); *United States v. Randell*, 761 F.2d 122 (2nd Cir. 1985)(*cert. denied*, 474 U.S. 1008); *United States v. Perholtz*, 836 F.2d 554 (D.C. Cir. 1987); *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991)(*per curiam); United States v. Dietz*, 51 F.3d 269, (4th Cir. 1995)(*per curiam*).

Other circuits, however, have rejected this "close question" formulation favoring a for more stringent definition of "substantial question" requiring "a significant question at issue ... which is neither novel, which has not been decided by controlling precedent, or which is fairly doubtful." *Miller, supra*, 753 F.2d at 23; *See Handy, supra*, 761 F.2d at 1279); *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985); *United States v. Flynn*, 16 Fed. Appx. 958 (10th Cir. 2001).

JOHNSTON'S APPEAL PRESENTS NUMEROUS "SUBSTANTIAL QUESTIONS" WHICH SUPPORT HER RELEASE PENDING APPEAL

Johnston's appeal raises multiple substantial questions of law or fact which would justify release pending appeal under 18 U.S.C. § 3143(b)(1)(B). As detailed below, Johnston can easily demonstrate that at least one of the issues presented by her is substantial under any formulation and, decided in her favor, would result in reversal, new trial or a reduced sentence. As such, the Court should properly find that release pending appeal is proper.

1. Suppression of evidence obtained from Performance Title Company.

Among the few counts upon which Johnston was convicted[2] were counts 15, 16 and 17 of the Superseding Indictment. These were the only counts which involved Performance Title, one of the two title companies in which Johnston had an ownership interest as outlined in the superseding indictment. The Government's evidence on these specific counts primarily included and relied upon documents seized from Performance Title. Johnston moved pre-trial to suppress this evidence as the affidavit supporting the search warrant failed to identify any probable cause to search Performance Title and was, thus, insufficient on

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[2] Johnston was acquitted of 13 of 18 counts in which she was charged.

its face.[3] *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The issue was resolved by the United States District Court for the District of Maryland by relying upon his opinion of the issuing magistrate as "the smartest man I know" to find the affidavit supporting the search warrant as sufficient. No other probable cause was articulated.

The searches and seizures at issue were carried out pursuant to a series of search warrants issued by United States Magistrate Judge Paul W. Grimm ("search warrants"). The search warrants were issued based upon the Affidavit of FBI Special Agent James J. Costigan (the "Affidavit").

The Fourth Amendment requires that search warrants particularly describe the place to be searched and the items to be seized. *Andressen v. Maryland*, 427 U.S. 463, 480 (1976); *Stanford v. Texas*, 379 U.S. 476, 481-85 (1965); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The appellate court below has emphasized that it does not authorize "fishing expeditions" or "a random exploratory search or intrusion" in derivation of the "particularity" requirement of the Fourth Amendment. *United States v. Owens*, 848 F.2d 462, 466 (4th Cir. 1988).

The Affidavit provides broad descriptions of documents to be seized which boil down to any document relating to any person or property described in the Affidavit. It is patently obvious that no effort was made to tailor the description of documents to be seized to those which would prove a criminal act. As

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[3] Suppression was the appropriate remedy for this failure. *United States v. Leon*, 468 U.S. 897 (1984).

such, the Government failed to comply with the particularity requirements as clearly outlined by this Court.

Even more important here, the Fourth Amendment requires that before a search warrant may issue, there must be probable cause to believe that seizable items will be found at the place to be searched. *United States v. Wylie*, 705 F.2d 1388, 1391-2 (4th Cir. 1983); *See, United States v. Errera*, 616 F.Supp. 1145, 1149 (D.Md. 1985); *United States v. Flippen*, 674 F.Supp. 536, 539 (E.D. Va. 1987). There must be a nexus, a link, between the alleged illegal activity and the place to be searched. *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988); *Wylie, supra*, 705 F.2d at 1391-2. A search is invalid, and the evidence seized must be suppressed, if the affidavit supporting the warrant fails to provide sufficient information by which a man of reasonable caution would believe seizable items are located in the place to be searched. Id. at 1392; *Errera, supra*, 616 F. Supp. at 1149. This affidavit contained not a scintilla of indication that seizable evidence was located at Performance Title.

While outlining an alleged scheme to defraud related to real estate transactions, the Affidavit fails to provide sufficient information as to what items are to be seized which relate to the illegal activity. Given the wide net the Affidavit describes, as stated above, there is no real attempt to provide a nexus between what is to be seized and the alleged criminal activity. The Affidavit does little more than describe transactions, which **may have** included illegal acts, and seeks search and seizure of any place which **may have** any

document relative to these transactions or the persons alleged to be involved in them. The Affidavit in this case is precisely the "fishing expedition" the court in *Owens* emphasized was not to be authorized.

There must also be a reasonable relationship between the time the alleged crime was committed and the search. "A valid search warrant may issue only upon allegations of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Gates, supra* 462 U.S. at 238; *See United States v. McCall*, 740 F.2d 1331, 1335-36 (4th Cir. 1984).

The Affidavit outlines activity supporting a finding of probable cause which occurred over a period of years before the warrant was issued. In an effort to cast its wide net, the Government failed to make any effort to relate the time of the issue of the warrant to the criminal conduct for which they seek evidence. **Indeed there is no mention of any criminal activity at Performance's office in the Affidavit. Moreover, there is no mention of any specific fact about Performance in the Affidavit other than Johnston was working there**. There was no nexus in the affidavit to criminal activity which would provide probable cause to search Performance.

The Government's search and seizure as authorized in the search warrant in this case, as supported by the Affidavit, was so overly broad in both time and scope that it represents an egregious violation of Johnston's Fourth Amendment rights. These searches and seizures violate nearly every

restriction placed upon warranted searches by this Court.

Finally, as developed during the suppression hearing in this case, Magistrate Judge Grimm suggested revisions to the affidavit, which were handwritten and initialed, because in its original form the affidavit lacked sufficient probable cause. This active participation in "punching up" an affidavit which was facially deficient took Magistrate Judge Grimm out of his role as a "neutral and detached judicial officer" and made him little more than a "rubber stamp" for law enforcement. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326, 60 L.Ed.2d 920 (1979)(finding that the magistrate "did not manifest that neutrality and detachment demanded of a judicial officer").

For all these reasons, the warrant is so facially deficient that the executing officers could not reasonably presume it to be valid and is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *See, United States v. Hyppolite*, 65 F.3d 1151, 1156 (4th Cir. 1995), *quoting, Leon*, 468 U.S. at 923. In a case such as this, the "good faith exception" does not apply and suppression would be mandated. *Id.*

At the very least, the question is one which under either of the standards outlined above is "substantial" and, decided in Johnston's favor, would result in reversal and/or a new trial. Thus, on this issue alone the Court may properly authorize release pending appeal.

2. The Government's Discovery Failures

The Government, in arguing Johnston's Motion for Release Pending Appeal before the district court, attempted to trivialize its conduct by relegating defense objections to mere bitter complaining that "the government did not mark its exhibits" to the Defendant's satisfaction. However, Johnston and her co-defendants at trial were harmed by the Government's failure to timely provide discovery and, in fact, the Government's repeated conduct at trial of providing evidence moments before its introduction, failure to provide copies of exhibits to counsel before their introduction and changing the Government's stated order of presentation of witnesses even from that stated at the end of the previous trial day.[4] As or more disturbing, however, was the failure by the Government at trial to provide the immunity letter of at least one witness and the refusal to provide statements of witnesses, including Johnston, until compelled by the Court.

"Society wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The failure by the Government to promptly provide evidence, especially potentially exculpatory evidence simply does not comport with standards of justice. Id., 373 U.S. at 88;

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[4]These repeated discovery violations were all noted on the record before and during the trial. The preparation of the record is in process and a complete recitation of these violations and duly noted objections will be presented as part of Johnston's appeal pending before the United States Court of Appeals for the Fourth Circuit.

See, United States v. Barnes, 634 F.2d 387, 390 (8th Cir. 1980)(while the administration of discovery rules are within the discretion of the trial court, prejudice to the substantial rights of the defendant mandates reversal of conviction).

Despite the trial court's warnings before the trial and despite the promises of the Government and the objections of defense counsel, the Government repeatedly failed to provide discovery completely and timely. The record clearly shows that Johnston and her co-defendants at trial were not provided with all the evidence employed by the Government with adequate notice to fully prepare for it in their defense. Nor was the Government's making available tens of thousands of documents, most of absolutely no relevance, with little or no organization or cataloging, in an unheated storage facility, sufficient to remedy these failures.

These issues present substantive due process violations which are "substantial", mandate reversal and, thus, justify Johnston's release pending appeal. *See Barnes, supra.*

3. Other Procedural and Substantive Violations[5]

Johnston will present the question of the trial court's denial of her Motion to Sever and the procedures the trial court was required to employ as a result of its failure to grant a severance. These issues, independently and certainly collectively, are

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[5] The Government did not dispute below that the errors presented herein were properly presented and preserved for appeal.

substantial issues which should result in reversal and/or a new trial.

While addressed to the sound discretion of the trial court, if prejudice to the defendant will result, the Court should grant a severance. Wright, *Federal Rules and Procedure*, § 223.

In *United States v. Echeles*, 352 F.2d 892, 896 (7th Cir. 1965), the Court stated:

> "Nevertheless, a single joint trial however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial."

Professor Wright points out that joinder of defendants is very frequently prejudicial and quotes Judge Holtzoff in regard to the original criminal rules as follows:

> "It was the purpose of the Committees to make it possible for Federal judges to prevent a mass trial, because a mass trial is contrary to the basic principles of our jurisprudence."

Wright, *supra.*

The problems which arise from the prejudicial joinder were the subject of comment in *United States v. Branker*, 395 F.2d 881, 888 (2nd Cir. 1968):

> "This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small portion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of indictments of criminal conduct which did not involve these defendants in any way. As trial days go by, 'the mounting proof of the guilt of one is likely to affect another.'"

The Second Circuit in *Branker* recognized that instructions to the jury are not a satisfactory means of solving the problem, since it leaves to the jury the task of mastering abstract principles of evidence and applying them to the vast amount of evidence introduced at trial. The court found that the risk of prejudice to the defendants by reason of the joinder in that case was so great that "no amount of cautionary instructions could have undone the harm."

In *United States v. Kelly*, 349 F.2d 720 (2nd Cir. 1965), the court recognized the danger of evidence against co-defendants rubbing off on the defendant in question. In the instant case, Johnston was indicted in most but not all of the counts of the Superseding Indictment and was acquitted of most but not all of those counts. There were weeks of testimony, much of which had nothing to do with Johnston, including the evidence presented after co-defendant Walter P. Hammond pled guilty and testified. The conviction of

co-defendant Leffler on all counts is further indication of the "slow but inexorable accumulation of evidence of fraudulent practices" by the Defendants jointly tried with Johnston which manifestly prejudiced Johnston's right to a fair trial. As such, it was an abuse of judicial discretion to deny Johnston's repeated motions for severance. *Kelly, supra*, 349 F.2d at 759.

The danger of additional prejudice, which Johnston foretold, occurred when a situation similar to that in *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962), arose. Johnston was denied the availability of corroborating testimony from Leffler. This was especially critical given the importance of her "advice of counsel" defense. Leffler's silence, which counsel could not draw to the jury's attention, denied Johnston any corroboration of her testimony regarding the "advice of counsel" she received and left her vulnerable to the Government's hollow argument that her testimony, while uncontradicted and wholly credible, was "just a performance." *See, United States v. Sanders*, 266 F. Supp. 615 (W.D. La. 1967)(when separate trials are necessary to avoid error, severance as to some defendants after trial begins is mandated as well as a declaration of a mistrial); *United States v. Shuford*, 454 F.2d 772, 776 (4th Cir. 1971)("[A] severance is obligatory where one defendant's case rests heavily on the exculpatory testimony of his co-defendant, willing to give such testimony but for the fear that by taking the stand in a joint trial he would jeopardize his own defense.")

Leffler declined to testify at the joint trial. The Court's denial of severance was an abuse of discretion

mandating a reversal or new trial and the issue presented by Johnston is substantial and supports her release pending appeal.

In addition to repeatedly denying severance, the District Court permitted counsel for Leffler to have a *de facto* rebuttal argument in a reversal of the strictly enforced order of presentation at trial. Full opportunity was taken by counsel for Leffler to comment negatively upon Johnston's testimony despite the fact that Johnston's counsel made none of the arguments which allegedly justified the change in order of presentation. Johnston's counsel could not respond despite the fact that by the order of presentation established during six weeks of trial he was entitled to argue after Leffler's counsel. Indeed, counsel for Johnston was constrained from arguing many of his points for fear of a counter-attack during Leffler's later argument. This was critically damaging to Johnston's closing presentations.

The denial of Johnston's repeated motions to sever presents yet another substantial issue as part of this Court's consideration of Johnston's appeal. A decision on this issue in Johnston's favor would mandate a new trial and, thus, supports permitting Johnston to be released pending appeal.

4. Improper Sentencing Issues

In a continuation of its conduct at trial, the Government failed, despite repeated requests, to provide Johnston's counsel with the evidence it anticipated presenting at sentencing as part of the

guidelines calculation undertaken by the Court. This information was known to the Government well in advance of sentencing. Johnston's counsel were given no opportunity to review the exhibits presented by the Government at sentencing which, while purportedly based upon evidence presented at trial, were new documents whose accuracy Johnston was never permitted to review and test. This had a direct bearing on the calculation of loss under the Sentencing Guidelines and was the single most important factor in the trial court's determination of the applicable Guideline range. This information was given to Johnston's counsel minutes prior to the sentencing hearing.

While recognizing the prejudice to Johnston by this improperly late disclosure, the trial court's remedy was to slightly reduce the amount of loss for calculation purposes by one level reduction. This, in no way, alleviated the prejudice to Johnston. The overall loss amount was based upon the entire "scheme to defraud" as defined by the Government. Johnston was deprived of an opportunity, despite her objections, to analyze and present an alternative calculation which reflected the jury's findings that Johnston was not guilty of involvement in the vast majority of the alleged scheme. Even the Government conceded below that Johnston was convicted of conduct that occurred during the latter time frame of the scheme to defraud. However, the Government never presented an amount of loss for this "latter time frame" and intentionally prevented Johnston's counsel from any opportunity to do so.

There exists a substantial question which this Court should decide warrants remand for resentencing in order for Johnston to be given a fair opportunity to argue loss under the advisory guidelines. Such a reduction, as warranted by the jury's findings, likely would result in a sentence less than the time Johnston would have served during the pendency of the appeal process. As such, on this point alone, this Court may properly find that release pending appeal is appropriate.

CONCLUSION

Johnston was denied due process by the bare denial of her Motion for Release Pending Appeal by both the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit.

Johnston presents no risk of flight or danger to the community if released during the pendency of her appeal. For the reasons outlined herein, Johnston's appeal raises substantial questions which, decided in Johnston' favor, would result in reversal, a new trial and/or a reduced sentence.

Forcing the incarceration of Johnston while her appeal is pending serves none of the purposes that 18 U.S.C. § 3143 was intended to address. Johnston respectfully prays that this Court not further punish her by compelling incarceration while the United States Court of Appeals for the Fourth Circuit considers her multiple assertions of error by the trial court. The damage of injustice to Johnston vastly outweighs any

prejudice to the Government by allowing Johnston to be released pending appeal.

WHEREFORE, Johnston respectfully requests that this Honorable Court grant her Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit concerning its denial of Johnston's request for release pending appeal.

Respectfully Submitted,

/s/ Andrew Radding
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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 15, 2005

No. 05-4487
CR-03-10

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KELLY J. JOHNSTON

Defendant - Appellant

ORDER

[Entered July 15, 2005]

Appellant has filed a motion for bail pending appeal.
The motion for bail pending appeal is denied.
Entered at the direction of Judge Wilkinson with the concurrence of Judge Widener and Judge Gregory.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. CRIMINAL NO. AMD 03-0010

DAVID ALLEN UHRICH, KELLY J. JOHNSON, and FREDERIC D. LEFFLER

ORDER
[Entered June 21, 2005]

Defendants David Allen Uhrich, Kelly J. Johnson, and Frederic D. Leffler were convicted by a jury of various counts of mail fraud and wire fraud on May 28, 2004, after several weeks of trial. On April 29, 2005, the court imposed sentences of incarceration upon all defendants under the advisory sentencing guidelines. Each of the defendants has filed a notice of appeal and each has filed a motion for release pending appeal. The government has opposed those requests. No hearing is necessary.

In each instance, the motion contends that a "substantial question" will be presented on appeal, *see* I8U.S.C. §3143(b)(2); *United Stales v. Steinhorn*, 927 F.2d 195 {4th Cir. 1991). In particular, defendants variously contend that issues of suppression of evidence, trial severance, and numerous trial errors, as well as sentencing issues, could possibly result in a reversal of their convictions. Having carefully considered the motions and the arguments of the parties, the court is constrained to the view that a "substantial question" has not

been identified and thus release pending appeal is not warranted. *Id.* Accordingly, the motions for release pending appeal (Paper Nos. 173, 176, 178) are DENIED.

To permit each defendant to seek review of this determination by the Court of Appeals, the date for each defendant to report to the institution designated by the Bureau of Prisons is extended until **July 29, 2005.**

It is SO ORDERED this 17* day of June, 2005. The Clerk is directed to TRANSMIT a copy of this order to all counsel.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District
Judge

United States District Court
District of Maryland

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed on or After November 1, 1987)
v.	Case Number: A.MD-03-0010
KELLY J. JOHNSTON (5)	USM Number: Defendant's Attorney: Andrew Radding Assistant U.S. Attorney: Joyce K. McDonald

[Entered May 2, 2005]

THE DEFENDANT:

pleaded guilty to count(s)_____

pleaded nolo contendere to count(s)_____, which was accepted by the court.

√ was found guilty on counts 13.14.15.16. & 17 of the Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341	Mail Fraud	June 21, 1999	13,14.15.16, & 17

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by U.S. v. Booker, 125 S. Ct. 73S (2005).

√ The defendant has been found not guilty on counts 2 thru 12, 18 & 19 of the Superseding Indictment

Count(s) ____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 0 days of any change of name, residence, or moiling address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

April 29, 2005
Date of Imposition of Judgment

/s/ Andre M. Davis 4/29/05
ANDRE M. DAVIS Date
United States District Judge

Court Reporter:
Cook

DEFENDANT: KELLY J. JOHNSTON (5)
CASE NUMBER: AMD-03-0010

IMPRISONMENT

The defendant is hereby committed ~~to the custody~~ of the United States Bureau of Prisons to be imprisoned for a term of 27 months as to each count, to run concurrently, for total term of 27 months.

√ The court makes the following recommendations to the Bureau of Prisons:

√ That the inmate be placed in a facility consistent with his security level that is as close as possible to: Alderson, West Virginia

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____a.m./p.m. on _____.
as notified by the United States Marshal.

The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

√ before 2 p.m. on Friday, June 17, 2005 .

The defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. § 3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

Have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ _, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

_____

By: DEPUTY U.S. MARSHAL

DEFENDANT: KELLY J. JOHNSTON (5)
CASE NUMBER: AMD-03-0010

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years as to each count, to run concurrent for z total term of Three (3) years ,

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

A. STATUTORY CONDITIONS OF SUPERVISED RELEASE

1) The defendant shall not commit any federal, state or local crime.
2) In any felony case, the defendant shall not possess a firearm or ammunition as defined in 18 U.S.C. §921.
3) The defendant shall not illegally use or possess a controlled substance.
4) The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
√ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

5) Pursuant to Pub. Law 108-405, Revised DMA Collection Requirements Under the Justice for All Act of 2004, if applicable, the defendant shall cooperate in the collection of DNA while incarcerated in the Bureau of Prisons, or as directed by the probation officer.

6) If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

B. STANDARD CONDITIONS OF SUPERVISION

The defendant shall not leave the judicial district without the permission of the court or probation officer;

The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

The defendant shall support his or her dependents and meet other family responsibilities;

The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
The defendant shall notify the probation officer ten days prior to any change in residence or employment;
The defendant shall refrain from excessive use of alcohol;
The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;
The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;
The defendant shall not enter into any agreement to ace as an informer or special agent of a law enforcement agency without the permission of the court;
As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make

such notification and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KELLY J. JOHNSTON (5)
CASE NUMBER: AMD-03-0010

CRIMINAL MONETARY PENALTIES

The defendant shall pay [he following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5., Pan B.

	Assessment	Fine	Restitution
Totals:	S 500.00	S Waived	S 58,362.18

If applicable, restitution amount ordered pursuant to plea agreement..... S

FINE

The defendant shall pay interest on any fine of more than S2.500, unless the fine is paid in full before the 15th Jay after the date of judgment, pursuant to 18 U.S.C. §3612(1). All of the payment options on Sheet 5, Fan B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

√ The court has determined that the defendant does not have the ability to pay a fine; therefore, a fine is waived.

The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived.

The interest requirement is modified as follows:

RESTITUTION

The determination of restitution is deferred until _____.
An Amended Judgment in a
Criminal Case will be entered after such determination.

√ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage Payment
	$58,362.18	

DEFENDANT: KELLY J. JOHNSTON (5)
CASE NUMBER: A.MD-03-001U

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; and (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ Special Assessment be paid in full within 30 days.

B √ $_____immediately, balance due (in accordance with C, D, or E); or

C Not later than _____; or

D Installments to commence_____day(s) after the date of this judgment.

E In_____*(e.g- equal weekly, monthly, quarterly)* installments of S_____over a period of_____year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of S_____per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several with:

☐ The defendant shall pay the following costs of prosecution and/or court costs:

☐ The defendant shall forfeit the defendant's interest in the following property to the United Stales:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. CRIMINAL NO. AMD-03-010

KELLY JOHNSTON
Defendant.

NOTICE OF APPEAL

[Entered May 4, 2005]

Notice is hereby given that Kelly Johnston, Defendant in the above referenced case, hereby appeals to the United States Court of Appeals for the Fourth Circuit the judgment and sentence entered in this case on April 29, 2005.

Respectfully submitted.

/s/ Andrew Radding
ANDREW RADDING (Bar No. 00195)
GREGORY M. KLINE (Bar No. 14363)
Adelberg, Rudow, Dorf & Hendler, LLC
2 Hopkins Plaza
600 Mercantile Bank & Trust Building
Baltimore, Maryland 21201
(410) 539-5195
(410) 539-5834 FAX
Attorney for Defendant, Kelly Johnston

CERTIFICATE OF SERVICE

I HEREBY CERTIFIY that on this 4th day of May 2005, a copy of the foregoing Notice of Appeal was mailed via first class mail, postage prepaid, to:

Joyce K. McDonald, Esq.
Assistant United States Attorney
36 South Charles Street
Baltimore, MD 21201

/s/ Andrew Radding
Andrew Radding

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Northern Division

UNITED STATES OF AMERICA	)
	) Docket No.:
	) AMD-03-010
vs.	) Defendant No.: 005
	)
Kelly J Johnston	)

PRESENTENCE REPORT

Prepared for:
The Honorable Andre M. Davis
U.S. District Judge

Sentencing Date:
October 29, 2004,
at 10:00 a.m.

Prepared by:
Eileen M. Hall
Senior U. S. Probation Officer

Office Location:
Baltimore, Maryland
(410) 962-4127
FAX (410) 962-0954

Offense: Counts Thirteen. Fourteen. Fifteen. Sixteen & Seventeen: Mail Fraud, in violation of Title 18, U.S. Code, Section 1341, a Class D Felony.

Date of Arrest: The defendant had her initial appearance on June 30, 2003.

Custodial Status: Personal Recognizance

Identifying Data

Date of Birth: 05/14/66 **Age:** 38 **Citizenship:** USA

Race: White Non-Hispanic **Sex:** Female **Dependents:** None

FBI No.: None Assigned **SSN:** 212-80-4849

Other ID No.: MVA No.: C200-465-428-366

Education: H.S. Diploma **U.S.M. No.:** 40854-037

Legal Address: 6370 Hanover Crossing Way

Hanover, MD 21076

Alias(es): Kelly J. Summerhill

Kelly Johnston Chase

Detainers: None.

Codefendants: Walter P. Hammond - On May 4, 2004, Mr. Hammond pled guilty to Counts Fourteen and Nineteen of the Superseding Indictment. Sentencing is pending.
David Allen Uhrich - On May 28, 2004, Mr. Uhrich was found guilty by a jury of Counts Twelve, Eighteen and Nineteen of the Superseding Indictment.
Sentencing is pending.

Christopher Francis - On March 8, 2004, Mr. Francis pled guilty to Count Five of the Superseding Indictment. Sentencing is pending.
Joyce Thelma Lehew - On February 3, 2004, Ms. Lehew pled guilty to Count Two of the Superseding Indictment.
Sentencing is pending.
Fredric Leffler - On May 28, 2004, Mr. Leffler was convicted by a jury of Counts Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen and Nineteen of the Superseding Indictment.
Sentencing is pending.

Assistant U.S. Attorney
Joyce K. McDonald, Esq.
6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
(410) 209-4800
FAX (410) 962-0122

Defense Counsel
Andrew Radding, Esq. (Retained)
600 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201-2927
(410) 539-5195
FAX (410) 539-5834

Date report prepared: July 2, 2004

Mandatory Minimum: ☐

Date report revised:

Probation is not an option: ☒

Disposition:

Photograph Not Available

Restrictions on Use and Redisclosure of Presentence Investigation Report. Disclosure of this presentence investigation report to the Federal Bureau of Prisons and redisclosure by the Federal Bureau of Prisons is authorized by the United States District Court solely to assist administering the offender's prison sentence *(i.e.,* classification, designation, programming, sentence calculation, prerelease planning, escape apprehension, prison disturbance response, sentence commutation, or pardon) and other limited purposes, including deportation proceedings and federal investigations directly related to terrorist activities. If this presentence investigation report is redisclosed by the Federal Bureau of Prisons upon completion of its sentence administration function, the report must be returned to the Federal Bureau of Prisons or destroyed. It is the policy of the federal judiciary and the Department of Justice that further redisclosure of the presentence investigation report is prohibited without the consent of the sentencing judge.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. Ms. Kelly Johnston is charged in a nineteen-

count Superseding Criminal Indictment with Count One, Bank Fraud, in violation of Title 18, U.S.C. §1344, Counts Two, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen and Nineteen, Mail Fraud, in violation of Title l 8, U.S.C. §1341, and Counts Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve and Eighteen, Wire Fraud, in violation of Title 18, U.S.C. §1343. The offenses occurred from in or about 1997 through in or about 2000, in the State and District of Maryland.

2. The defendant appeared in the United States District Court, in Baltimore, Maryland, on May 27, 2004, before the Honorable Andre M. Davis, U.S. District Judge. Kelly Johnston was found guilty by a jury of Counts Thirteen, Fourteen, Fifteen, Sixteen and Seventeen of the Superseding Criminal Indictment. A Presentence Investigation Report was ordered and sentencing is set for October 29, 2004, at 10:00 a.m., in the United States District Court in Baltimore, Maryland.

3. There is no plea agreement in this case.

4. Since the offense took place after November 1,19S7, the Sentencing Reform Act of 1984 is applicable. The updated United States Sentencing Guidelines Manual, effective November 1, 1998, is being used in this case as it benefits the defendant. U.S.S.G. §2F1.1 is deleted from the United States Sentencing Guidelines Manual under date of November 1, 2001.

Guideline Section 1B1.11 instructs the Court to use the Sentencing Guidelines Manual in effect on the date of sentencing, unless that manual would violate the ex post facto clause of the United States Constitution.

Related Cases

5. None known.

Offense Conduct

6. Ms. Joyce K. McDonald, Assistant United States Attorney, provided the government's version of the facts which were presented at trial. The highlighted portion of the facts is defense counsel's version of what was presented at trial.

7. "In 1997, Kelly Johnston formed Tower Title, Inc., with three other partners. Ms. Johnston was the only owner with experience managing a title company and serving as a settlement officer. She ran the day-to-day operations of the title company. **Ms. Johnston's partners were all real estate professionals and participated in numerous settlements before joining Tower Title. Johnston never owned a title company before joining Tower Title, nor did she serve as the sole manager of any title company before joining Tower Title, Inc. Johnston's partners testified at trial that they did participate in the overall management of Tower Title, Inc.** Tower Title performed

settlements for sales to homeowners and re-financings based upon referrals from a real estate business operated by Ms. Johnston's partners and from referrals from Ms. Johnston's long-term clients. Frederic Leffler was the attorney for the title company.

8. In 1997, Walter Hammond was already engaged in an illegal 'property flipping' scheme. However, he did not have a compliant title company performing satisfactory service. Chris Francis, who operated Value Appraisals, was doing inflated appraisals for Mr. Hammond. Mr. Francis recommended Tower Title to Mr. Hammond. **Ms. Johnston had no knowledge in 1997 of any 'illegal scheme' engaged in by Walter Hammond. Johnston was always advised by her counsel, Frederic Leffer, that there was nothing illegal or improper about the investment plan presented by Hammond. Hammond testified at trial that he had numerous title companies assisting him with his closings before and during the time that Tower Title, Inc., and Performance Title, Inc., were performing closings. Johnston was not 'compliant' but was advised by her counsel that the closings performed on behalf of Guardian Foundation were legal and proper. Johnston was acquitted of all counts regarding these initial transactions. Mr. Francis' wife, an employee of Tower Title, received a referral fee for the Guardian Foundation closings referred to Tower Title, Inc., all of which Johnston was advised by her counsel were**

proper and legal.

9. Mr. Hammond met with Ms. Johnston and Mr. Leffler in May 1998. At the initial meeting, Hammond explained that he would provide all the fluids for each 'investor/borrower' in the properties and promised that he would provide a high volume of settlements. At the time, Mr. Hammond had under contract a large number of Baltimore City properties at prices ranging from $10,000 - $15,000. **At the initial meeting, Johnston was informed that Guardian Foundation, a corporation owned by Hammond, was an investment group and tht the 'investor/borrowers' were members of the group. Hammond stated that the investment group would be providing the closing funds on behalf of the 'investor/borrowers' who were members of the group. Johnston had no previous experience with real estate investments involving investment properties. For that reason, she insisted that her attorney, Leffler, be present at the initial meeting. Leffler advised her that the outlined plan was legal and proper.** Hammond planned to 'flip' these properties to 'investor/borrowers' for inflated prices supported by inflated appraisals. **Johnston had no knowledge of Hammond's plans to 'flip' properties and no one at her title companies ever saw any of the inflated appraisals or had knowledge that any appraisals were inflated.** Hammond helped the investor/borrowers obtain mortgage loans on these properties, and he received cash from the transactions as the intermediate owner when the

flipped property settled. Ms. Johnston and Mr. Leffler agreed that Tower Title would serve as the settlement agent for Mr. Hammond's transactions. **Guardian Foundation as the seller on the transactions received seller's proceeds from the closings after the 'investor/borrower' signed the promissory note and mortgage/deed of trust securing the loan, provided that the funds from the borrower had been received. As in many transactions, the seller could designate to whom and in what amount the proceeds could be paid. Guardian Foundation executed documents directing Tower Title, Inc. to pay seller's proceeds to Hammond.**

10. The first settlements for Hammond at Tower Title were conducted on June 24 and 26, 1998. They were conducted personally by Mr. Leffler for the investor/borrower Annette Porter. Ms. Johnston signed documents as the settlement agent although she participated in the initial settlements by preparing documents, disbursing the files, and notarizing signatures.

11. These first settlements all failed to follow the HUD-1 settlement statement; for example, no funds were collected from the investor/borrower despite the statement on the HUD-1 to the contrary. On several of the first seven settlements, the funds due from the investor/borrower were 'netted' against the proceeds and were not collected at all. **Seller's proceeds were withheld in the amount of funds on behalf of the borrower which were outstanding. There was no 'netting out' of this**

money. In addition, Mr. Leffler and Ms. Johnston permitted Hammond or his Guardian Foundation company to sell the property to an investor/borrower before Guardian Foundation had actually purchased the property. Instead, Ms. Johnston permitted Hammond to use the mortgage lender's funds from the second settlement to fund the first settlement. This use of the lender's funds was not disclosed on the HUD-1. **The transactions occurred on the same day in different offices of Tower Title, Inc., and were nearly simultaneous. Johnston was acquitted on every count related to these transactions, which she had been advised were legal and proper. Funds on behalf of the borrower were provided by Guardian Foundation as per the plan outlined by Hammond at the initial meeting at Tower Title, Inc. Leffler conducted these closings in order to show Johnston and the other agents at Tower Title, Inc., how to perform these transactions and repeatedly advised that they were legal and proper. Guardian Foundation designated that properly released seller's proceeds be paid to the property owners. Johnston was acquitted of every count related to these first settlements. There was no requirement that Tower Title disclose to the lender the assignment of seller proceeds as directed by Guardian Foundation. The HUD-1's given to the lender reflected payoff amounts paid to the property owners as part of the loan transaction.**

12. Typically, lenders loaned 80% of the appraised

value of the property believing that the appraisal was reliable. In addition, lenders believed that investor/borrowers had put up 20% of the sales price based upon the HUD-1 or settlement statement. According to the settlement sheet, also called a HUD-1, faxed to the lender by Ms. Johnston's title company, the investor/borrower was investing in the property. The amount of the borrower's contribution, any amount the seller was contributing to the sale, and the cash at settlement from or to the borrower are all set forth on a portion of the HUD-1 called 'Summary of Borrower's Transaction.' The 'Summary of the Seller's Transaction' sets forth the financial details from the standpoint of the seller. Tower Title, as the settlement agent, received the lender's funds into its escrow account, and according to defense witnesses, owed a fiduciary duty to the lender to follow its instructions in disbursing the funds. **The HUD-1's reflected that funds were being provided by or on behalf of the borrower. Commonly, gift funds, relocation funds and other funds provided on behalf of the borrower are reflected on Line 303 of the HUD-1. Johnston was told by Hammond that the funds on behalf of the 'investor/borrower' were being provided by the investment group. Leffler conducted the initial settlements and advised that these transactions were legal and proper. Leffer advised that the HUD-1 's were properly prepared and were legal. Johnston was acquitted by the jury on every count related to these transactions.** Kelly Johnston or the Tower

Title representative who acted as settlement agent signed a statement on the HUD-which provided:

13. 'The HUD-l Settlement Sheet which I have prepared is a true and accurate account of the transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.'

14. After the closing, Tower Title sent the completed settlement package including original, signed documents via overnight delivery to the mortgage lender.

15. Despite the certification on the HUD-l that the settlement sheet is 'true and accurate' and that 'funds [are] disbursed in accordance with the HUD-l,' Ms. Johnston permitted Walter Hammond to deviate from the HUD-l and concealed those deviations from the lender. Ms. Johnston personally settled, or caused settlement agents working for Tower Title to settle, properties for which (1) the investor did not produce borrower's funds and (2) Walter Hammond produced the borrower's funds in the following different ways: (a) borrower's funds were presented days after the settlement when the lender's funds were disbursed the day of settlement, (b), lender's funds in the exact amount necessary for borrower's cash at settlement were disbursed to Walter Hammond prior to the actual settlement, and Walter Hammond used the check drawn on the title

company's escrow account to purchase a bank cashier's check in the exact amount necessary for the buyer's funds and to reflect on the cashier's check the name of the 'investor/borrower,' or (c) the title company 'netted' the amount due from borrower against the amount the seller would receive from the settlement, and the borrower produced no funds for settlement. In fact, Tower never collected a single borrower/investor payment from anyone other than Walter Hammond. **Johnston was acquitted of every count in which she was the settlement agent and signed the certification quoted from the HUD-l despite the alleged 'deviations' cited by the government. No effort was made to conceal any transaction from the lender. The HUD-l properly reflected funds provided by 'on or behalf of the investor/borrower. Leffler advised that Hammond's providing funds on behalf of the investor/borrowers was legal and proper. Seller's proceeds were distributed after the borrower signed the necessary promissory note and deed of trust and the seller, Guardian Foundation, directed that these funds be paid to Walter Hammond. Seller's proceeds were withheld in the amount of any outstanding funds from borrower. Multiple witnesses testified that such distributions were not unusual. Leffler advised that handling seller's proceeds in this manner was proper and legal. The jury acquitted Johnston of all the counts involving transactions which she personally settled. The jury also acquitted Johnston of multiple counts in which the investor did not**

produce borrower funds and where Hammond provided funds on behalf of the borrower including where seller proceeds were used in whole or in part to provide funds on behalf of the borrower. Johnston's understanding from her initial meeting with Hammond and Leffler was that the investment group would always provide the funds on behalf of the borrower, as advised was proper and legal by Leffler.

16. In January 1999, Ms. Johnston realized that Tower Title's records did not reflect the receipt of borrower's funds from transactions in which she had caused the amount due from the borrower on the HUD-1 to be 'netted' against the profits paid by the title company to Hammond or Guardian Foundation. Ms. Johnston caused checks to be issued from settlements, which she required Hammond to endorse and pay over to the title company, to create paperwork which made it appear that Tower Title had collected funds from the borrower. In all, Tower Title settled over 94 properties for Mr. Hammond. **Johnston became aware, as part of the routine file closing process, that certain transactions had not been completely resolved and that sellers' proceeds were still being withheld because funds on behalf of the borrower were still outstanding. In each of these transactions, someone other than Johnston controlled the disbursement and the undisputed testimony at trial was that the delay in resolving the issue was caused because the seller was not demanding the remainder of its proceeds as would be the normal course. It was not until**

copies of the deeds and other documents filed with the land records were returned, typically four to six months after the real estate closing, and the transaction files were being closed that Johnston became aware that the transactions had not been finalized. Johnston then sent the remaining funds on behalf of the borrower from Guardian Foundation and disbursed the remaining seller's proceeds. Johnston did not 'create paperwork' but upon discovery of transactions that had been finalized sought the remaining funds on behalf of the borrower and disbursed the proceeds. The jury acquitted Johnston of the counts involved in these transactions.

17. Ms. Johnston left Tower Title in early 1998 and formed Performance Title. **Johnston left Tower Title, Inc., and formed Performance Title, Inc., in 1999.** She was the sole owner. Mr. Leffler stopped being Tower Title's counsel and became the attorney for Performance Title. **At the time that Performance Title, Inc., was established, Leffler served as not only the counsel for the company but ran the day to day operations for which he was paid a mangement fee.** When Ms. Johnston started Performance Title, Mr. Hammond moved his settlements from Tower Title to Performance Title. **Hammond took several settlements to another title company and completed still other settlements at Tower Title, Inc., eventually bringiag settlements to Performance Title.** Ms. Johnston also hired away from Tower some of its employees so that Performance Title continued the same practices it had followed at Tower. **In addition, Johnston hired new employees to work at**

Performance Title, Inc. Leffler, who had day to day management responsibilities, approved the practices of the office and advised they were proper and legal. Performance Title settled over 51 properties for Mr. Hammond. At the time of the execution of the search warrant by the FBI at Performance Title on March 23,2000, Hammond still had pending settlements at Performance Title.

18. Tower or Performance Title charged more than their usual rate and sometimes a double fee for Mr. Hammond's settlement work. They collected approximately $1000 per settlement from Hammond. Investors defaulted on their mortgage payments on all properties purchased through Walter Hammond and settled by Tower Title or Performance Title. **The fees charged to Guardian Foundation were negotiated between Hammond, Leffler and Johnston and included items typically charged separately in other transactions. As such, the fee cannot be fairly compared to any 'usual rate' charged by Tower Title, Inc., or Performance Title, Inc. Multiple real estate professionals, under questioning by the government, stated that there was nothing excessive or unusual about the fees charged in the Guardian transactions.** Total losses caused to mortgage lenders on the settlements performed by Tower Title or Performance Title total more than $2.5 million. **Guardian Foundation made many mortgage payments on multiple properties but eventually failed and the loans defaulted throughout 2000. No evidence was presented at trial as to the total losses suffered by the lenders for closings performed at Tower Title, Inc., and Performance Title, Inc. The testimony of loss at trial for the closings included in**

the indictment was that, in many cases, the properties had some value but were not foreclosed upon or that the lenders were able to recover some amount to offset their loss and in some cases completely offset the loss. No evidence was presented to support a finding regarding the actual total losses suffered by mortgage lenders. The loss figure cited includes many transactions ID which the jury acquitted Johnston of any criminal conduct or which were never decided by the jury. Given that such figures provide an enhancement of Johnston's sentence, they must be proved to a jury beyond a reasonable doubt.
"

Victim Impact

19. Due to the corporate nature of this case, victim impact statements were not solicited.

Adjustment for Obstruction of Justice

20. There is no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

21. The defendant declined to discuss any aspect of the instant offense. She is not eligible for a reduction pursuant to U.S.S.G. §3E1.1.

Offense Level Computations

22. Pursuant to U.S.S.G., Section 3D1.2(d) grouping

is permissible when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. We are grouping Counts Thirteen, Fourteen, Fifteen, Sixteen and Seventeen.

Counts Thirteen. Fourteen. Fifteen. Sixteen & Seventeen - Mail Fraud

23. **Base Offense Level:** The United States Sentencing Commission Guideline for violation of 18 U.S.C. §1341 is found in U.S.S.G. §2F1.1 and calls for a base offense level of 6. **6**

24. **Specific Offense Characteristic:** The government contends that the loss in this case is more than $2,500,000, but not more than $5,000,000, for an increase of thirteen levels pursuant to U.S.S.G §2Fl.l(b)(l)(N).

+13

25. The defense objects to the loss calculation by the government. No amount of loss was decided by the jury. Any damage figures introduced were de minimus and must exclude any amount of loss for those properties in which the lender failed to offset the outstanding mortgage amount by proceeding with foreclosure. Given no loss amounts were proven to the jury, the Guidelines figures must remain

at the basic six (6) for the actual crime in question. No enhancement is permissible.

+0

26. **Specific Offense Characteristic:** Because the offense involved more than minimal planning and a scheme to defraud more than one victim, two levels are added pursuant to U.S.S.G §2Fl.l(b)(2).

+2

27. The defense objects to the above enhancement, noting that the government has provided no factual basis.

+0

28. **Victim-Related Adjustments:** None.

+0

29. **Adjustments for Role in the Offense:** The defendant abused her position of trust as a licensed settlement agent and used her special skill to significantly facilitate the commission and concealment of the offense. Two levels are added pursuant to U.S.S.G §3B1.3.

±2

30. The defense contends that the defendant was acquitted of thirteen counts in which the government alleged irregularities with regard to the escrow account at issue. The government has provided no evidence that Johnston violated any closing instruction from the lender or directed that others violate any closing

instruction. The government has provided no evidence that Johnston, or anyone at her direction, concealed any offense with the intent to defraud any lender.

+0

31. **Adjustment for Obstruction of Justice:** The defense contends mat the defendant testified falsely at trial in an attempt to obstruct justice. Two levels are added pursuant to U.S.S.G. §3C1.1. Pursuant to U.S.S.G § 3C1.1, two levels are added.

±2

32. The defense objects to the enhancement for obstruction of justice, noting that the defendant testified truthfully both at pre-trial hearings and at trial.

+0

33. **Adjusted Offense Level (Subtotal):**

25 or 6

34. **Adjustment for Acceptance of Responsibility**: The defendant has not demonstrated acceptance of responsibility for her criminal conduct. A reduction under U.S.S.G. §3E1.1 is not recommended.

-0

35. **Total Offense Level:**

25 or 6

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

36. The defendant has no known juvenile criminal history.

Adult Criminal Convictions

37. Record checks with the FBI, NCIC, State and Local authorities reflect that the defendant has no prior adult criminal convictions.

Criminal History Computation

38. The total of the criminal history points is zero. According to the sentencing table at U.S.S.G Chapters, Part A, zero criminal history points establish a criminal history category of I.

I

Other Criminal Conduct

39. The defendant has no known other criminal conduct.

Pending Charges

40. The defendant has no known pending charges.

Motor Vehicle (Traffic) Record

41. A computer search of the Maryland Department of Transportation, Motor Vehicle Administration's records revealed that the defendant has a valid Maryland driver's license, Soundex No. C200-465-428-366, with no points assessed against it and no history of serious motor vehicle violations.

PART C. SENTENCING OPTIONS

Custody

42. **Statutory Provisions:** The maximum term of imprisonment is 5 years per count, pursuant to 18 U.S.C. §1341.

43. **Guideline Provisions:** Pursuant to U.S.S.G Chapter 5, Part A, based on a total offense level of 25 and a criminal history category of I, the guideline range for imprisonment is 57 to 71 months.

44. Based on a total offense level of 6 and a criminal history category of I, the guideline range for imprisonment is 0 to 6 months. Pursuant to U.S.S.G, Section §5C1.1(b), because the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

Supervised Release

45. **Statutory Provisions:** If a term of imprisonment is imposed for counts Thirteen, Fourteen, Fifteen, Sixteen and Seventeen, a term of supervised release of not more than 3 years may also be imposed, pursuant to 18 U.S.C. §3583(b)(2).

46. Such terms of supervised release run concurrently, pursuant to 18 U.S.C. §3624(e).

47. **Guideline Provisions:** Supervised release is required if the Court imposes a term of imprisonment of more than one year or when required by statute, pursuant to U.S.S.G. §5Dl.l(a). If a sentence of imprisonment of one year or less is imposed, a term of supervised release is not required but is optional, pursuant to U.S.S.G. §5D1.l(b). The guideline range for a term of supervised release is at least two but not more than three years, pursuant to §5D1.2(a)().

Probation

48. **Statutory Provisions:** The defendant is eligible for not less than one nor more than five years probation by statute, pursuant to 18 U.S.C. §3561(c)(l).

49. **Guideline Provisions:** Because the applicable guideline range is in Zone D of the Sentencing Table, the defendant is not eligible for probation,

pursuant to U.S.S.G. §5B 1.1 (a), Application Note 2.

50. The defendant is eligible for probation because the applicable guideline range is in Zone A of the Sentencing Table, pursuant to U.S.S.G. §5Bl.l(a)(l). If the court imposes probation, the term must be at least one year, but not more than five years because the offense level for the instant offense is 6, pursuant to U.S.S.G §5B1.2(a)(l).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

51. Kelly Johnston Chase, the defendant, was born in Baltimore, Maryland, on May 14, 1966, the second of two children born to Anne (nee: Punte) and Richard Johnston, Jr. Mrs. Johnston Chase advised that her parents separated when she was five years of age and both parents remarried approximately two years later. The defendant's mother and her second husband had an additional daughter.

52. The defendant's mother, Anne Orthner, age 63, lives with her husband, Hans Orthner, at 835 Coachway, Annapolis, Maryland. She is employed as a nurse and Hans Orthner is an architect. The defendant's father lives with his

wife at 105 Roosevelt Rd., Sykesville, Maryland. Richard Johnston is a food broker.

53. The defendant's eldest sister, Bernadette Logan, age 39, is a dentist. She is married and the mother of one child. Bernadette Logan lives at 222 Orchard Drive, Paoli, Pennsylvania. The youngest sister, Monika Orthner, age 20, lives with her parents and attends college.

54. Ms. Johnston Chase reported a happy childhood devoid of any type of abuse or neglect. She advised that she is close with her parents, stepparents and siblings.

55. In February, 1987, the defendant was married to Douglas Summerhill in Baltimore County, Maryland. No children were bom to this union. The couple was divorced in Howard County, Maryland, in 1997.

56. On April 7, 2000, Ms. Johnston Chase was married to Carlton Chase in Howard County, Maryland. The defendant and her husband do not have children. Mr. Chase is a former realtor; he is the current president of Performance Title Company.

57. The Probation Officer spoke with the defendant's mother, who verified the family background information. Mrs. Orthner described the defendant as a "fine human being" and honest person who has been wrongly charged and convicted. Mrs. Orthner related

that she is extremely concerned and supportive of the defendant, as is the entire family.

58. The Probation Officer conducted a home visit to 6370 Hanover Crossing Way, Hanover, Maryland. The defendant and her husband live in a colonial-style home in a middle-class neighborhood. The home was well-maintained and nicely furnished.

Mental and Emotional Health

59. The defendant reported that she has never seen a psychiatrist or psychologist. She stated that she has never had any mental or emotional health problems.

Physical Conditions. Including Drug Dependency and Alcohol Abuse

60. The defendant stands 5' 3" tall and weighs approximately 140 pounds. She has brown hair and blue eyes. Ms. Johnston Chase denies having any tattoos or other major identifying marks. She described her health as, "good." The defendant stated that she has never had any surgeries, nor has she ever been hospitalized. She denied receiving any medical treatment or taking any prescription medications.

61. The defendant stated that she consumes alcohol on a social basis; however, she has not experienced any alcohol-related problems.

62. The defendant denied any use of illegal substances. She denied attending any alcohol/ drug treatment programs.

Education and Vocational Skills

63. Ms. Johnston Chase was educated in the Howard County, Maryland, public school system. She graduated from Glenely High School on May 30, 1984. She advised that she attended the University of Maryland Baltimore County briefly in 1984. From February 4, 1991, through May 21,1993, Ms. Johnston Chase attended Howard County Community College full-time, although she did not earn an Associate degree. She completed 61 credit hours with a grade point average of 3.639.

64. Ms. Johnston Chase advised that she participated in a 30-hour seminar and received her title insurance license in 1995. The license is renewable every two years; she last renewed her license in June, 2003.

Employment Record

65. Ms. Johnston Chase advised that following high school graduation, she worked as a teller for Regal Savings Bank for approximately eighteen months.

66. From 1985 through 1987, the defendant reports to have worked as a receptionist/processor at B. F. Saul Mortgage Company in Lutherville,

Maryland. This company is no longer in operation.

67. From 1987 through 1988, Ms. Johnston Chase reports to have worked as a receptionist/processor for Corcoran Title Company in Columbia, Maryland. This company is no longer in business.

68. From April 21, 1989, through July 23, 1993, the defendant worked as a settlement officer for Anchor Title Company in Columbia, Maryland.

69. From 1992 through March, 1997, Ms. Johnston Chase reports to have worked as a settlement officer for Lakeview Title Company in Columbia, Maryland. Verification is pending.

70. From April, 1997, through February 14, 1999, Ms. Johnston Chase was the President and co-owner of Tower Title Corporation, Pasadena, Maryland. According to the current President, the defendant "resigned to continue with work we would not allow. This is what got her in trouble. Ms. Johnston did break the law. She is not to be trusted. She did open a competing business while she was President of Tower Title Corporation."

71. From March, 1997, through June, 2003, Ms. Johnston Chase was President of Performance Title Company, Columbia, Maryland. Ms. Johnston reported that her income was $6,250/month plus bonuses. Ms. Johnston's

husband has been President of the company since June, 2003.

Military Service

72. The defendant has never served in the military.

PART E. FINES AND RESTITUTION

Statutory Provisions

73. The maximum fine for Counts Thirteen, Fourteen, Fifteen, Sixteen and Seventeen is $250.000 per count, for a total of $1,250,000, pursuant to 18 U.S.C. §3571.

74. A special assessment of $500 ($100 per count) is mandatory, pursuant to 18 U.S.C. §3013.

Restitution

75. Pursuant to The Antiterrorism and Effective Death Penalty Act of 1996, 18 U.S.C. §3664, has been modified to include Subsection (d)(l) which requires:

"Upon the request of the Probation Officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the Probation Officer with a listing of the amounts subject to restitution."

Subsection (e) provides, in part, that: "The burden of demonstrating the amount of loss sustained by a victim

as a result of the offense shall be on the attorney for the Government."

76. The Government has not provided any information concerning restitution.

Guideline Provisions

77. Based on a total offense level of 25, the fine range for the instant offense is from $10,000 to $100,000 pursuant to U.S.S.G §5E1.2(c)(3).

78. Based on a total offense level of 6, the fine range for the instant offense is from $500 to $5,000.

Defendant's Ability to Pay

79. The defendant submitted a financial statement and accompanying documentation. Based on the defendant's statement and an analysis of her financial profile as summarized below it appears that the defendant is able to pay a fine in this case. U.S.S.G §5E1.2(a).

ASSETS

Cash

Checking Account(s)	$19,350.00
Savings Account(s)	$ 3,500.00
Stocks/Bonds/Mutual Funds	$13.400.00
Subtotal	**$36,250.00**

Unencumbered Assets

Motor Vehicles	
Two (2) sets Jet Skis	$16,000.00
Boat - 2002 Formula 40 PC	$300,000.00
Household Furnishings	$25,000.00
Vintage Vehicles	$30,000.00
Two (2) Harley Davidson Motorcycles	$32,000.00
Subtotal	**$403,000.00**

Equity in Other Assets

*Real Estate	$319,000.00
TOTAL ASSETS:	**$703,250.00**

LIABILITIES:

Unsecured Debts

Motorcycle Loans	$20,000.00
Boat Loan	$280,000.00
Outstanding Credit Card Debt	$30,000.00
TOTAL LIABILITIES:	**$330,000.00**
NET WORTH:	**$373,250.00**

Monthly Cash Flow

Income

Defendant's Net Salary	$0.00
Spouse's Net Salary	$6,250.00
Commissions	$8,333.00
Total Income:	**$14,583.00**

Necessary Living Expenses

Mortgages	$2,276.00
Utilities	$200.00
Water/Sewer	$20.00
Telephone	$60.00
Groceries, supplies	$500.00